Supreme Court, U.S.
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No. 93-1311

In The

Supreme Court of the United States

October Term, 1993

ROBERT GEORGE BURCHILL,

Petitioner,

versus

DOUGLAS KISH, *et al.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT PROPERLY AFFIRMED THE DISMISSAL OF PETITIONER'S COMPLAINT WITH PREJUDICE BASED ON PETITIONER'S FAILURE TO OBEY A COURT ORDER REQUIRING HIM TO FILE AN AMENDED COMPLAINT BY A DATE CERTAIN.

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COUNTERSTATEMENT OF THE CASE

Petitioner, Robert George Burchill, filed a complaint pursuant to 42 U.S.C. Section 1983 alleging that his civil rights were violated by Respondents Douglas Kish, Scott R. Rehrig, Michael Harbove, Donald K. MacConnell, Arthur Spitko, Thomas Toth, South Whitehall Police Department and South Whitehall Township (hereinafter the "Township Respondents") and eight (8) additional respondents. Petitioner's complaint alleged that the Township Respondents violated Petitioner's constitutional rights during the May 13, 1990 arrest of Petitioner and search of his home.

In response to various motions filed by all of the respondents, the United States District Court for the Eastern District of Pennsylvania (hereinafter the "District Court") entered an order on February 22, 1993 conditionally dismissing Petitioner's complaint subject to his right to file an amended complaint within 21 days. On March 9, 1993, the District Court entered an order granting Petitioner's motion to enlarge the time for filing an amended complaint. Under the terms of the March 9, 1993 order:

> Plaintiff's Amended Complaint shall be filed within twenty-one (21) days of the date of this order or this case will be dismissed with prejudice. *NO FURTHER EXTENSIONS WILL BE PERMITTED.*

Accordingly, Petitioner's amended complaint was to be filed by March 31, 1993, 21 days after the March 9, 1993 order. Petitioner failed to file an amended complaint within the time period prescribed. Thereafter, on April 6,

1993 the District Court entered an order dismissing Petitioner's complaint with prejudice as to all respondents.

Petitioner then filed an appeal to the United States Court of Appeals for the Third Circuit (hereinafter the "Court of Appeals"). The Court of Appeals, by order dated November 12, 1993, affirmed the April 6, 1993 judgment of the District Court. By order dated December 16, 1993, the Court of Appeals denied Petitioner's petition for rehearing. Petitioner thereafter filed a petition for writ of certiorari with this Court.

SUMMARY OF ARGUMENT

In his petition for writ of certiorari, Petitioner fails to identify how the decision of the Court of Appeals conflicts with the decision of another federal court of appeals on the same matter so as to call for an exercise of this Court's power of supervision. *See* Rule 10.1(a) of the Rules of this Court. The decisions of the District Court and the Court of Appeals are consistent with the judicial interpretations of Fed. R.Civ.P. 41(b) which confirm a court's power to dismiss an action based on a plaintiff's failure to comply with an order of court.

Moreover, Petitioner has failed to offer any reason justifying relief from judgment under Fed. R.Civ.P. 60. In essence, Petitioner's argument is that the rules regarding computation of time set forth in Fed. R.Civ.P. 6 were not applied properly. Not only is this argument flawed, such an issue is not one which involves any "special and important reasons" justifying the grant of certiorari. Rule 10.1(a) of the Rules of this Court.

ARGUMENT

I. This Case Does Not Involve Special or Important Reasons for The Granting of Certiorari

As the Rules of this Court provide, certiorari will be granted "only when there are special and important reasons therefor". Rule 10.1. The case at bar involves no such reasons and the decisions of the courts below realistically have no impact on anyone other than the parties to this suit. This Court has previously held that certiorari is to be granted only in cases involving principles, the settlement of which is important to the public generally rather than to the parties specifically, and in cases where there is a real conflict of opinion and authority between courts of appeals. *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 95 L.Ed. 479, 71 S.Ct. 453 (1951).

In the present case, the decisions below involved the straightforward application of the Federal Rules of Civil Procedure. Petitioner has identified no decision of any court of appeals that conflicts with the decisions of the courts below.

II. Dismissal of Petitioner's Suit Under Federal Rule of Civil Procedure 41(b) Was Proper

Under Federal Rule of Civil Procedure 41(b), where a plaintiff fails to comply with an order of court, a defendant may move for dismissal of the action. It is also well-settled that a court may dismiss an action on its own motion where a plaintiff does not comply with an order of court. *Link v. Wabach R.R.*, 370 U.S. 626, 8 L.Ed. 2d 734, 82 S.Ct. 1386 (1962); *U.S.N. Co. v. American Express Co.*, 55

F.R.D. 31 (E.D.Pa. 1972). The March 9, 1993 order of the District Court was clear and self-executing. The order mandated that Petitioner's amended complaint be filed within 21 days of the date of the order or the case would be dismissed with prejudice. There is no dispute that Petitioner's amended complaint was filed beyond this deadline.

A dismissal under Fed. R.Civ.P. 41(b) for failure of a plaintiff to comply with an order of court is a matter resting within the sound discretion of the trial court. Such a dismissal will be reversed on appeal only for an abuse of discretion. *Hewlett v. Davis,* 844 F.2d 109 (3rd Cir. 1988). Where, as here, a litigant flagrantly violates or ignores a court order, a district court often has no appropriate recourse other than dismissal. *Mindek v. Rigatti,* 964 F.2d 1369 (3rd Cir. 1992).

III. Petitioner Did Not Advance Any Basis For Obtaining Relief From Judgment

Fed. R.Civ.P. 60 sets forth the bases for obtaining relief from a judgment or order: clerical mistakes; mistake, inadvertence, surprise or excusable neglect; newly discovered evidence; fraud; the judgment is void; the judgment has been satisfied; any other reason justifying relief from the judgment. Petitioner has not articulated any of these bases. Indeed, Petitioner filed his motion for relief from judgment on April 21, 1993 with the District Court, and then, before that motion could be considered, he filed an appeal to the Court of Appeals. As the District Court correctly observed, when Petitioner filed his appeal he deprived the District Court of jurisdiction over the

case and prevented it from ruling on his motion for relief from judgment. *Shempp v. School District,* 184 F.Supp. 381 (E.D. Pa. 1959).

Petitioner's argument is based upon an erroneous interpretation of Fed. R.Civ.P. 6 that would presumably allow his amended complaint to be considered filed in a timely manner. It is beyond dispute that Petitioner's amended complaint was filed with the District Court on April 8, 1993, two days after the order dismissing the case was entered. Subsection(e) of Fed. R.Civ.P. 6 provides that when a party is required to act within a prescribed period after the service of notice by mail, 3 days shall be added to the prescribed period. Regardless of whether Petitioner chooses to interpret the date of the District Court's order as March 9, 1993 or March 11, 1993, his amended complaint was filed beyond the deadline taking into account the 3-day period set forth in Fed. R.Civ.P. 6(e).

Petitioner claims that because his amended complaint was mailed on April 5, 1993, this constitutes timely filing. Under Fed. R.Civ.P. 5(e), "filing with the court" is defined as the filing of a pleading or other paper with the clerk of court. Filing does not occur when a pleading or paper is deposited in the mail; rather, it occurs when the pleading is received by the clerk of court or the judge, in an appropriate case. Petitioner's assertion confuses the service of his amended complaint with the filing of his amended complaint. Under Fed. R.Civ.P. 5(b), service by mail is complete upon mailing. However, the same is not true of papers filed by mail. *Wiss v. Weinberger,* 415 F.Supp. 293 (E.D. Pa. 1976). In summary, Petitioner failed to file a timely amended complaint in violation of a court order.

IV. To the Extent That Petitioner's Motion Is Considered a Motion to Alter or Amend a Judgment It was Not Timely Filed

Federal Rule of Civil Procedure 59(e) requires that a motion to alter or amend a judgment be served within ten days after the entry of the judgment. The ten-day time period contained in this Rule is jurisdictional and cannot be extended in the discretion of the District Court. *See Glass v. Seaboard C.L.R. Co.*, 714 F.2d 1107 (11th Cir. 1983). In the case at bar, the judgment dismissing the case was entered on April 6, 1993 and Petitioner's motion was not served until April 17, 1993, beyond the ten-day deadline. This time limitation is to be strictly construed. *McConnell v. Medical & Ben. Plan*, 778 F.2d 521 (9th Cir. 1985).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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